IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-774

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners, twelve professional journalists,[1] two corporations engaged in the business of publishing newspapers,[2] and the Reporters Committee for Freedom of the Press, who were the plaintiffs below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 11, 1978.

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[1] Jack Anderson, Marquis W. Childs, Emmett Dedmon, Richard Dudman, Morton Mintz, Bruce Morton, James R. Polk, John Pierson, David E. Rosenbaum, Richard Salant, Daniel Schorr, and Frederick Taylor.

[2] Dow Jones & Co., Inc. and Knight-Ridder Newspapers, Inc.

OPINIONS BELOW

The opinion of the court of appeals, which has not yet been reported, is reproduced in the Appendix. The opinion of the District Court for the District of Columbia, which is unreported, is also reproduced in the Appendix (hereinafter "App.").

JURISDICTION

The final judgment of the court of appeals was entered on August 11, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This case presents, as to telephone toll records, the important question expressly left open in *United States* v. *Miller*, 425 U.S. 435, 444 n.6 (1976). Stated broadly, that question is whether persons exercising First Amendment rights are entitled to reasonable notice that will permit them to seek prior judicial scrutiny of government subpoenas to third parties for business records of their transactions that identify those who assist them in exercising such rights.

Stated in the narrower terms presented by this record, the question is whether newspaper organizations and reporters are entitled to reasonable notice that will permit them to seek prior judicial scrutiny of government subpoenas to telephone companies for toll call records that identify their news sources.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Facts

This case, filed in 1974, arises from the long-standing and widespread practice of the American Telephone and Telegraph Company ("AT&T") and the operating companies of the Bell System to make available routinely to government investigative agencies and others the long distance telephone toll billing records of their subscribers, without any advance notice whatever to the subscribers whose records are to be released. During one sixteen-month period alone (March 1974 through June 1975), the Bell System made toll billing records available to government investigative agencies on 32,000 separate occasions, an average of over 2,000 a month. In 90 percent of these instances, the subscriber received no notice of the request before the records were in government hands.[3]

These telephone toll billing records identify all long distance calls made by a subscriber and all collect long distance calls made to a subscriber.[4] They are a valuable investigative tool that officials can use to identify many of

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[3] *See* Joint Appendix at 227-29 in *Reporters Comm. for Freedom of the Press* v. *American Tel. & Tel. Co.*, No. 76-2057 (D.C. Cir. 1978) (hereinafter "JA").

[4] A subscriber's toll records contain the date, the city and the number called (or calling) for all such calls. Commercially available publications list telephone numbers numerically and give the name of the subscriber for each number listed. Government investigators deposed by petitioners stated that they used such publications to identify the persons whose numbers were listed on petitioners' toll records.

the persons with whom a person talked by long distance during a specified period.[5] When the records are those of a reporter, they are a potent weapon for official surveillance of the press because they can serve to reveal indiscriminately to the requesting agency the reporter's confidential news sources.

Notwithstanding the sensitivity of the information in these records, the current practices of government agencies in requesting these records—and of the Bell System in furnishing them—provide no opportunity for prior judicial scrutiny of the propriety of such requests. AT&T's formal policy, adopted in March 1974 in consultation with the Justice Department and applicable to the entire Bell System, is to release those records automatically, whenever it receives a judicial or administrative subpoena or an administrative summons that appears valid on its face. As this Court observed in *Zurcher* v. *Stanford Daily*, —— U.S. ——, 98 S. Ct. 1970, 1980 (1978), such subpoenas and summonses are issued at the behest of government investigators in a wholly ministerial fashion, and "do not involve the judiciary [or] require proof of probable cause."

The Bell System's current policy offers some after-the-fact notice to subscribers of these requests, but does not require that the notice precede the release of the records. In language negotiated between AT&T and the Justice Department, AT&T's official policy statement provides that notice will be deferred for 90 days or longer, without question, whenever the government officer requesting the information certifies that notice "could impede the investigation."[6]

[5] *See* A. Schlesinger, *Robert Kennedy and His Times* 186 (1978). One investigator on the Senate's Racket Committee staff "developed a technique by which, through close analysis of long distance telephone toll tickets, he could find out to whom anyone talked on a given day. The staff indexed thousands of toll tickets and plotted the calls on worksheets. 'This way they always thought we were wiretapping,' said [another investigator on the staff], 'but we weren't.'" *Id.*

Because the telephone companies do not question toll record requests, and because the reporters whose records are requested do not receive timely notice of official demands for their toll records, there is, as a practical matter, no opportunity for judicial scrutiny at any time before the release of the records. Neither the good faith of the investigators, nor the validity of the proceeding in which disclosure is compelled, nor the relevance of the information to that proceeding, nor the breadth of the request as compared to the asserted law enforcement need, is ever subject to prior judicial examination. Journalists have no opportunity, until after the damage is done, to seek to limit overly broad requests, or to protect against uncontrolled dissemination within the Government of sensitive information whose production might be justified only in very narrowly defined circumstances.

The record below documents five instances in which petitioners' toll records were released by the Bell System to government investigators under circumstances that conclusively prove the potential for abuse that results from this lack of sufficient notice to permit reporters to seek prior judicial oversight.

In the summer of 1971, the Nixon Administration, alarmed by the publication of the so-called *Pentagon Papers* and frustrated in its efforts to persuade the courts to enjoin that publication,[7] began a massive investigation to identify who had been involved in the leak of those

[6] JA at 37. AT&T had originally proposed that notice be deferred only when the Government certified that it "*would* obstruct and impede" an investigation. *Id.* at 119-20 (emphasis added). At the Government's request, "would" was changed to "could" and the "obstruct" was dropped. *Id.* at 121-25. Such certifications are routinely issued. As noted above, no notice was given to subscribers in approximately 90 percent of the 32,000 instances in which telephone records were disclosed between March 1, 1974 and June 30, 1975. *Id.* at 227-29.

[7] *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

papers.[8] In the course of the investigation, the Government used grand jury subpoenas to obtain from a telephone company the toll records of petitioners Richard Dudman and Knight Newspapers, who were affiliated with newspapers that had published portions of the *Pentagon Papers*. Respondent Chesapeake and Potomac Telephone Company ("C&P") released those records without any notice to Dudman or to Knight, notwithstanding that the subpoenas were, on their face, invalid.[9]

Later that summer, the Justice Department, in an inquiry again ordered by the White House, used grand jury subpoenas to obtain the telephone records of petitioner Jack Anderson and three of his employees. This time the purpose of the subpoenas was to learn the sources of a story in Anderson's syndicated column about the indiscretions of an intoxicated United States official during a visit by Vice President Spiro Agnew to Kenya.[10] Testimony below indicated that the Government hoped to silence the sources by publishing their identities.[11]

Just one year later, the FBI, investigating reports that Anderson had arranged to receive documents removed by militant Indian protesters from the Bureau of Indian Affairs, again used a grand jury subpoena to obtain records of telephone calls by Anderson and one of his

[8] Other excesses committed in the course of this investigation led ultimately to dismissal of the prosecution of Daniel Ellsberg. *United States* v. *Russo*, No. 9373 (C.D. Cal. May 11, 1973).

[9] The subpoenas were issued through the United States District Court for the District of Massachusetts but sought C&P records in the District of Columbia. JA at 127-28, 136, 141.

[10] The story was obtained from a diplomatic cable, labelled "classified" by the State Department, which reported that the official had "crashed" a party for the Vice President that "culminated in his getting sloshed . . . , making passes at the Vice President's secretary and trying to drag her down the steps to meet an elephant at ground level. . . ." *Id.* at 168-71, 219-21.

[11] *See id.* at 222-23.

employees. The records obtained in this instance covered a period beginning three months before the incident in which documents were removed from the Bureau. In following up "leads" from the toll records it obtained, the FBI interviewed an attorney in Arizona who had been a source of a story in Anderson's column completely unrelated to the Bureau of Indian Affairs incident, starting a chain of events that led to the source's loss of his job in the Phoenix District Attorney's office.[12] One of Anderson's employees subsequently learned of this subpoena and moved to have it quashed. By then, however, the Government already had the records. While the court granted the motion to quash and ordered the FBI to destroy the records still in its possession, the damage had already occurred.[13]

In 1973, without any formal process whatever, a White House official requested and obtained the telephone records of petitioner James Polk. Documents relating to this affair show that the Government's sole purpose in obtaining the toll records was to discover embarrassing information about Polk that could be used to halt his stories relating to Herbert Kalmbach's campaign contribution activities.[14]

In January 1974, the Government, using an administrative summons issued by the IRS, obtained the records of all toll calls over a six-month period made by David Rosenbaum, a reporter in the Washington Bureau of the

[12] *Id.* at 172-73, 267.

[13] *In re Grand Jury Proceedings (United States* v. *Whitten)*, Misc. No. 38-73 (D.D.C. July 6, 1973).

[14] JA at 183-86. The Government has denied petitioners' allegations with respect to this occurrence. However, petitioners introduced documentary evidence to prove those allegations, and the Government refused to respond to interrogatories regarding the matter. The grounds for the refusal were that no office of the executive branch any longer had information about the matter and that neither the House Judiciary Committee nor the attorneys for Richard M. Nixon would allow the Government's attorneys access to documents that might have disproved the allegations.

New York Times, and by everyone else in the Bureau—a total of some 2500 calls. The IRS investigation of Rosenbaum's news sources was initiated when a politically influential taxpayer complained that Rosenbaum had telephoned him with information that a tax fraud investigation of the taxpayer was being suppressed for political reasons. The IRS apparently selected a six-month period simply because that is the period for which the telephone companies retain toll records. The agency made no effort to evaluate whether records for the entire period were necessary for its investigation.[15] There was no conceivable justification for such a broad demand, covering every toll call made by every New York Times reporter in the Washington Bureau for this critical period in the nation's political history.

Petitioners, as they became aware of these incidents, sought assurances from AT&T that their telephone records would in the future not again be turned over to government investigators without prior notice. They advised AT&T that, absent such assurances, legal action would be taken. AT&T, after meetings and consultations with the Justice Department which resulted in a major concession to the Department's views,[16] adopted the formal policy about disclosure of telephone records described above. However, as a practical matter, the Bell System's formal policy is no different from its pre-1974 practice.[17]

[15] *See id.* at 200, 230-53.

[16] *See* pages 4-5 and note 6, *supra*.

[17] Although the policy formalizes the requirement of notice, the policy still does not require notice of a request for disclosure prior to the disclosure itself. Moreover, no notice at all will be provided for at least 90 days whenever government investigators certify that notice "could impede the investigation." JA at 37. Even after the 90 day period, noitce will be given only in the event of a specific request by the subscriber, or if he has placed on record with the company a standing request for notice. No notice—advance or subsequent—was given to subscribers in approximately 90 percent of the 32,000 instances in which toll records were released to government investigators between the time the new policy was adopted on March 1, 1974 and June 30, 1975. *Id.* at 227-29.

Journalists and news organizations, and other subscribers who use the telephone to exercise First Amendment rights, are still deprived of the notice needed to seek judicial scrutiny before such intrusions into their First Amendment activities take place.

B. Litigation

Petitioners brought this suit in December 1974 in the District Court for the District of Columbia to challenge the Bell System's practice. Although the petitioners sued only the telephone companies, the United States elected to intervene on the telephone companies' side. Petitioners sought a declaratory judgment that their rights under the First and Fifth Amendments had been invaded and an injunction requiring that they be given notice and an opportunity to invoke judicial protection prior to such intrusions on their newsgathering activities.[18] On August 17, 1976, the district court granted respondents' motion for summary judgment, holding that "*Branzburg* v. *Hayes*, 408 U.S. 665 (1972), does not give this protection to reporters' sources and thus forecloses plaintiffs' First Amendment claim." [19]

Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit, which affirmed in part, by a 2-1 vote, on August 11, 1978, with each member of the panel writing separately. The majority[20] held that petitioners were not entitled to prior notice or to prior judicial oversight of requests for their telephone records, except in special cases where they

[18] Jurisdiction in the district court was based on 28 U.S.C. §§ 1331, 1337, 1343(1), 1343(3), 1343(4), 2201.

[19] App. at 4c. The court also held that the pattern of cooperation between the telephone companies and the Government involved state action. *Id.* at 3c.

[20] Judge Robinson generally joined in the opinion for the court written by Judge Wilkey, except for a portion of the court's opinion holding that the Fourth and Fifth Amendments provide the only protection available to the press against good faith criminal investigations. *Id.* at 42a-43a.

could show (1) that their telephone records previously had been obtained in bad faith, (2) that there was an imminent likelihood of additional bad faith requests for their records, and (3) that they would suffer actual and irreparable injury as a result of the Government's conduct.[21] Explaining the burden placed on newsmen by these criteria, the court said that a reporter or publisher would not be entitled to notice unless he could show a "pervasive pattern of past abuse such as will indicate a *continuing* program of misconduct," and further that news sources had in fact been or would very likely be lost as a result of past or threatened bad faith subpoenas.[22] The court concluded that the five petitioners whose records had been furnished to the Government had adduced enough evidence of these necessary elements to withstand a motion for summary judgment. It therefore remanded the case to the district court with respect to those five petitioners.[23]

Judge Wright, dissenting, argued that since the First Amendment protects the newsgathering function of the press, the courts should afford journalists the procedural protection of prior notice whenever government activity invades this constitutionally protected function. Judge Wright based this conclusion on this Court's prior decisions in *Branzburg* v. *Hayes*, *supra*, and *Zurcher* v. *Stanford Daily*, *supra*. He observed:

[21] The court of appeals found it unnecessary to decide whether respondent companies' activities constituted state action, because the Government was a party to the case and any equitable relief afforded petitioners against government action would also operate against anyone in "active concert or participation" with the Government. *Id.* at 17a.

[22] *Id.* at 72a-73a (emphasis in original). The court added that this likelihood of harm to news sources could not be inferred from the fact that the identity of a source had been disclosed, or even from the fact that a source had ceased to cooperate at the time its identity was disclosed. *Id.*

[23] Those five petitioners were Jack Anderson, Richard Dudman, Knight Newspapers, James Polk, and David Rosenbaum.

> "Both of these decisions, . . . far from holding that the First Amendment rights involved were deserving of no procedural protections, turned explicitly on the determination that prior judicial scrutiny on a case-by-case basis which *was* afforded was sufficient to protect the First Amendment rights at stake. In the instant case, on the other hand, no form of judicial scrutiny at all is provided." [24]

REASONS FOR GRANTING THE WRIT

Under the decision of the court of appeals, the Bell System is free to continue complying with government demands to disclose its subscribers' telephone records without any prior notice to those subscribers. This absence of prior notice permits government investigators to continue, as the record shows they have in the past, to obtain toll billing records that identify in a wholesale fashion the news sources of professional journalists, without any prior judicial scrutiny of the justification for such disclosure.

This case squarely raises the issue expressly left unresolved in *United States* v. *Miller*, 425 U.S. 435 (1976). That issue is whether a person whose First Amendment interests are invaded by a subpoena to a third-party recordkeeper is entitled to the notice needed to seek prior judicial scrutiny before the information is revealed.[25] The First Amendment interests of a telephone subscriber in preventing the Government from learning the identity of those with whom he speaks are beyond question. Whether the subscriber is engaged in protected political activity as

[24] *Id.* at 101a (emphasis in original).

[25] As the Court noted in *Miller*:

> "Respondent [did] not contend that the subpoenas infringed upon his First Amendment rights. There was no blanket reporting requirement of the sort . . . addressed in *Buckley* v. *Valeo*, 424 U.S. 1, 60-84 (1976), nor any allegation of an improper inquiry into protected associational activities of the sort presented in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975)." 425 U.S. at 444 n.6.

in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), or in protected newsgathering, as in this case, the Government cannot insist on disclosure of the identity of those that help him, unless the public need for that disclosure outweigh's the subscriber's protected First Amendment interests.[26] When the Government demands such disclosure, is the subscriber entitled to the notice he needs to seek a judicial balancing of these competing interests before his rights are invaded? The Court should grant the writ to decide this important question.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION NOT PREVIOUSLY DETERMINED BY THIS COURT THAT SUBSTANTIALLY AFFECTS THE NEWSGATHERING ABILITY OF THE PRESS.

This Court has twice in the last six years decided cases involving the First Amendment interests of the press and the law enforcement needs of the Government.

In *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), a reporter, subpoenaed to testify before a grand jury during an investigation into illegal drug traffic, refused to testify, asserting that as a member of the press he had an absolute right not to disclose his confidential sources. This Court affirmed an order requiring the reporter to testify, holding that the First Amendment does not give reporters license to refuse "to answer questions relevant to an investigation into the commission of crime." [27] The Court recognized, however, that for the Government to require the press "indiscriminately to disclose [its sources of information] on request" [28] would substantially burden the newsgathering function, and that this would seriously infringe First Amendment values because "without some

[26] In *NAACP* v. *Alabama*, the Court held that the state of Alabama could not, in the course of litigation, require the NAACP to disclose the identities of its rank-and-file members, when such disclosure was not directly relevant to any issue in that litigation.

[27] 408 U.S. at 682.

[28] *Id.*

protection for seeking out the news, the freedom of the press could be eviscerated." [29] The Court emphasized that especially careful judicial scrutiny was necessary whenever the Government sought testimony that would disclose a reporter's confidential sources:

> "Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." [30]

Mr. Justice Powell, whose fifth vote provided the majority in *Branzburg*, echoed this reminder of the need for judicial supervision to prevent infringement of First Amendment rights:

> "As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." [31]

In *Zurcher* v. *Stanford Daily*, —— U.S. ——, 98 S. Ct. 1970 (1978), a student newspaper sought a ruling that a warrant issued by a magistrate *ex parte* could not be used to authorize the search of the paper's premises for photographic evidence of a crime. This Court upheld the use of an *ex parte* warrant to authorize such a search, noting that "the general rule requiring search warrants issued

[29] *Id.* at 681.

[30] *Id.* at 708.

[31] *Id.* at 709-10.

by neutral magistrates" had itself grown out of "the long struggle between Crown and press." [32] Once again the Court emphasized the importance of prior scrutiny by a neutral judicial officer before governmental intrusions into the newsgathering activities of the free press are authorized:

> "The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits." [33]

Again providing the fifth vote, Mr. Justice Powell underscored the importance of supervision by the magistrate:

> "While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . when he weighs such factors." [34]

In both of these recent cases, prior judicial oversight was a key part of the process by which the government intrusions were permitted. The questioning of reporters in *Branzburg* was subject to prior supervision by a judge through a motion to quash, and in *Stanford Daily*, the search was pursuant to a warrant issued by an impartial magistrate before the search took place. The intrusions were sustained only because this opportunity for prior judicial scrutiny existed, so that the claimed interference with protected First Amendment activity could be balanced against, and carefully limited by, a judicial appraisal of the competing weight of the Government's legitimate law enforcement needs.

Here, in contrast to these recent cases, the person whose First Amendment activities are threatened has no

[32] 98 S. Ct. at 1981.

[33] *Id.* at 1982.

[34] *Id.* at 1984.

assurance whatever that a judge will play his vital part in the process by which disclosure of telephone toll records occurs. By an arrangement the Government has made with the nation's largest telephone system, government investigators can routinely obtain toll billing records in total secrecy and without any prior scrutiny by a judicial officer. Reporters receive no prior notice of subpoenas or other requests for their toll records and therefore cannot seek prior judicial scrutiny. This case presents for the first time the important question whether the Government may intrude into the newsgathering function without following any procedures that afford an opportunity for prior judicial oversight before the intrusion occurs.

The impact of the ruling below cannot be minimized. Telephone toll records permit government investigators to discover readily who a reporter's confidential news sources are, and the record shows that the investigators have made use of this opportunity.[35] Such disclosure not only will reveal, and perhaps silence, established sources, but also may deter others from becoming sources.[36]

When government investigators obtain a reporter's toll records, they learn much more than the particular information they may legitimately seek. They necessarily

[35] Precisely this occurred as a result of the disclosure of Jack Anderson's toll records, with unfortunate results for a news source who was the source of a story different from the one for which Anderson was being investigated. *See* discussion pp. 6-7, *supra*.

[36] This Court should not be under the impression that only professional law enforcement investigators in the Department of Justice can obtain toll records. The most egregious abuse disclosed by the present record was committed by the I.R.S., which sought and obtained the toll records of the entire New York Times Washington Bureau for six months in order to discover the source of a single news story. As Judge Wright stressed in his dissent, several dozen federal administrative agencies (including, for example, the Securities and Exchange Commission, the Federal Trade Commission, the Subversive Activities Control Board, and the Railroad Retirement Board) have the authority to issue subpoenas or summonses in conducting their investigations. App. at 115a-16a (dissenting opinion below).

learn the identities of the sources on whom a reporter relies for news about other activities, including government activities not within the scope of the particular law enforcement investigation. And they also learn from each toll call a reporter makes much about the pattern of his investigative activities—whom he calls, when and in what order he makes calls to develop his leads, what subjects he is looking into, and how actively he is exploring those subjects.[37] This is the very "indiscriminate" disclosure that the Court cautioned against in *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 682.[38]

The impact of such disclosure on the ability of the press to gather news and to perform its "special and constitutionally recognized role . . . in informing and educating the public," *First National Bank* v. *Bellotti*, 435 U.S. 765, 761 (1978), even if it cannot be precisely measured, is plainly significant. A reporter's job is to gather information quickly in order to meet daily or weekly news deadlines. Because he must obtain that information throughout the nation and the world, he is highly dependent on the telephone. He cannot function efficiently if he must avoid using the telephone because of the risk that his confidential sources will be disclosed.

The news most likely to be stifled by the ruling below will be the sensitive stories involving "the communication of news and commentary on current events" that are most likely to embarrass persons in public office, or otherwise

[37] *See* discussion p. 4 n.5, *supra*. The President's Privacy Study Commission has recognized these dangers, concluding: "Since the mere fact of communication is often as revealing as the content, the Commission believes that toll records should be protected as well." Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* 356 (1977).

[38] Thus, in contrast to the questionable invasion of privacy resulting from the disclosure of bank records in *United States* v. *Miller*, *supra*, the disclosure of telephone records involved in this case has a very palpable effect on newsgathering.

to attract the attention and ire of the Government. The public interest in allowing such stories to see the light of day, absent a compelling countervailing interest, is the same fundamental value that underlies the First Amendment's prohibition of prior restraints. *See Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 559 (1976); *Near* v. *Minnesota*, 283 U.S. 697, 720-22 (1931).

The particularly flagrant abuses that precipitated this lawsuit may not be occurring at the present moment. But abusive practices halted by the glare of public exposure may, of course, recur. And reasonable fears of recurrence can themselves dry up news sources and deter the reporting of news that risks the disclosure of its source.[39]

II. THE DECISION BELOW IS INCORRECT UNDER THIS COURT'S PRIOR RULINGS.

Petitioners seek a declaratory judgment that the arrangement between the Government and the Bell System to disclose the toll records of professional journalists without prior notice of government requests for such records is inconsistent with the First and Fifth Amendments. In refusing to grant this relief, the court of ap-

[39] In at least one recent instance, a major metropolitan newspaper withheld the publication of a news story in order to avoid bringing about efforts to discover its news source. "The Bee Censors Itself," *Sacramento Bee*, Sept. 29, 1978. *See* App. at 1e-3e. In two other instances, news sources refused to provide information to reporters because of fears of disclosure of their identities generated by recent government intrusions on news source confidentiality. *See* statement prepared by Robert Healy, Executive Editor of the *Boston Globe*, for submission to the Subcomm. on Government Information and Individual Rights of the House Government Operations Comm., 95th Cong., 2d Sess. (1978); "Law's No Shield For Reporters, Journalism Group Told," *Bergen Record*, Sept. 15, 1978. In one of these instances, reporters "contacted what used to be a good source in the New York City Police Department, and he said he'd seen what happened to Farber and that he wasn't talking to us." *Bergen Record*, *supra*.

peals rendered a decision that conflicts with this Court's "[i]nsistence on rigorous procedural safeguards" whenever First Amendment rights are at stake. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975).

In cases dealing with government action that threatens First Amendment interests, particularly the communication of information and ideas, this Court has regularly "insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of [the proposed action] which circumstances permit." [40] The Court has stressed that the heart of such "procedural provisions" is the availability of *prior* judicial scrutiny.[41]

> "The teaching of our cases is that . . . only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . . ." *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965).

Prior notice is an essential prerequisite to these protections. The right to prior judicial scrutiny "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to contest." *Goss* v. *Lopez*, 419 U.S. 565, 579 (1975).

That this case involves the compelled disclosure of confidential relationships with news sources, rather than a direct prior restraint on the exercise of First Amendment rights, in no way lessens the need for these protections. "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976). This Court has therefore required the same

[40] *Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *see Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969); *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964).

[41] *See Southeastern Promotions, Ltd.* v. *Conrad*, *supra*; *Carroll* v. *President & Commissioners of Princess Anne*, *supra*; *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

careful judicial scrutiny of the justification for such compelled disclosure" that it has required in cases involving prior restraints. Thus an organization engaged in protected First Amendment activity may not be compelled to disclose its membership, absent a showing *satisfactory to a court* that the Government's "interest in obtaining the disclosures . . . is sufficient to justify the deterrent effect which . . . these disclosures may well have on the free exercise" of First Amendment rights. *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958).[42]

The opportunity to seek prior judicial scrutiny of such "compelled disclosure" exists, as a matter of course, when, as in *Branzburg* and *NAACP* v. *Alabama*, a subpoena is directed to a newsman himself or to another person engaged in protected First Amendment activities. In the case of telephone toll records, however, the subpoenas are addressed not to the reporter but to a third party. Because the deterrent effect of compelled disclosure of information concerning protected First Amendment activities does not depend on the ownership or possession of the records disclosed, prior judicial scrutiny is still necessary to protect First Amendment rights. For this reason, if a reporter learns of a subpoena, he is entitled, without question, to seek judicial review prior to its enforcement. *See Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 501 n.14 (1975). But if this right to prior judicial scrutiny is to be anything more than a Kafka-esque chimera—wholly dependent on the rare chance that a reporter will learn of a subpoena from some source other than the telephone company—notice must be given by either the Government or the telephone company before disclosure so that such scrutiny may be sought.

[42] *See also Pollard* v. *Roberts*, 393 U.S. 14 (1968) (affirming *per curiam* the judgment of a three-judge district court enjoining a state prosecuting officer from subpoenaing the party records of the Arkansas Republican party).

Petitioners' position that prior notice must be given in order to provide a realistic opportunity to invoke judicial protection is not the equivalent, as Judge Wilkey characterized it, of imposing "an ongoing judicial audit of future government investigations." [43] Petitioners do not ask that judges be required to pass on all requests for disclosure. They seek only the notice that would enable them to invoke judicial oversight, when necessary, to prevent repetition of the unwarranted and unnecessary injuries to constitutional rights that resulted from the toll record disclosures documented below.[44]

The intrusions into confidential relationships protected by the First Amendment that were sustained in *Branzburg* and *Stanford Daily* were permitted *because* neutral judicial officers reviewed the justification for those intrusions before they occurred. Surely petitioners are entitled to the same opportunity for prior judicial scrutiny here. To deny that opportunity would leave the press without any "constitutional protection for the confidentiality of [its] sources," *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974).

It is no answer to hold, as did the court of appeals, that prior notice may be available for those individual journalists who can demonstrate that their telephone records are likely to be sought in bad faith and that they would actually be injured by disclosure of those records.[45]

[43] App. at 66a.

[44] Petitioners do not ask the Court to establish new standards for balancing the First Amendment interests of citizens and other, competing interests of the Government, or to decide whether a particular government interest, be it the interest in criminal investigation or any other, would warrant the intrusion on First Amendment interests resulting from disclosure of a reporter's toll records in a specific case.

[45] The court of appeals' requirement that journalists first demonstrate bad faith and actual injury is based on an erroneous view of the proper scope of judicial review. According to the court of appeals, courts may not question an intrusion into protected First Amendment activities in the course of a criminal investigation absent evidence that the investigator is acting for the purpose of harassing the press. *See* App. at 73a-75a. However, in *NAACP* v. *Alabama*, *supra*, although there was no allegation of bad faith, the Court reviewed the scope of the disclosure sought to ascertain whether it was broader than the state's interests required. And Mr. Justice Powell's concurring opinion in *Branzburg* v. *Hayes*, *supra*, directed the lower courts explicitly to look beyond the subjective good faith of the investigator. *See* 408 U.S. at 709-10. As Judge Wright observed in his dissenting opinion below, the lower courts have heeded that directive and regularly review subpoenas inquiring into a reporter's newsgathering activities to protect the reporter's sources against overbroad inquiries, regardless of the good faith of the investigator. *See* App. at 112a-13a.

Unnecessary and irreparable injury to newsgathering may occur whether or not disclosures are sought in bad faith. News sources may be revealed unnecessarily as a result of a good faith but overly broad demand for disclosure of toll records. Moreover, without prior notice, there will be no opportunity to demonstrate bad faith before the damage has been done. The ruling below, in failing to appreciate these dangers, disregards the many cases in which this Court, in a variety of contexts, has recognized that "infringement of [First Amendment] rights, even though unintended, may inevitably follow" from the destruction of confidentiality. *NAACP* v. *Alabama*, *supra*, 357 U.S. at 461.[46]

The decision below, by allowing the Government and the Bell System to withhold prior notice to reporters, insulates the disclosure of toll records from the prior judicial oversight that reporters could seek if such notice were given. No legitimate government interest is served by this departure from the rule of prior judicial supervision established in *Branzburg* and *Stanford Daily*. While there

[46] *See, e.g., Buckley* v. *Valeo*, *supra*, 424 U.S. at 64; *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

may conceivably be unusual national security or law enforcement circumstances where the Government has a bona fide need to obtain a reporter's toll records without his knowledge, it is not beyond the capability of the courts to fashion a procedure for at least *in camera* judicial scrutiny before such records are disclosed. *See Zweibon* v. *Mitchell*, 516 F.2d 594, 647-48 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). Surely these rare and exceptional cases cannot justify the failure to give prior notice in the great majority of instances in which the Government demands reporters' toll records and no such exceptional concerns exist.

CONCLUSION

This case raises an important issue, never previously resolved, as to whether government investigators may intrude on the exercise of First Amendment rights without any prior judicial sanction whatever, and without affording the victim the notice needed to seek judicial protection before the intrusion occurs. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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